Supreme Court, U.S.
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No. 95-662

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT COUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that an error in the jury instructions was harmless.

2. Whether the district court correctly instructed the jury on the standard for determining whether a police officer has used unreasonable force.

3. Whether an appellate court has jurisdiction to review a district court's refusal to exercise its discretion to depart downward from the applicable Guidelines range.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	5
Brecht v. *Abrahamson*, 113 S. Ct. 1710 (1993)	5
Chapman v. *California*, 386 U.S. 18 (1967)	5
Fikes v. *Cleghorn*, 47 F.3d 1011 (9th Cir. 1995)	8-9
Graham v. *Connor*, 490 U.S. 386 (1989)	4, 7
Jaffee v. *Redmond*, 51 F.3d 1346 (7th Cir.), cert. granted, 116 S. Ct. 334 (1995)	9
Koon v. *United States*, cert. granted, No. 94-1664 (Oct. 4, 1995)	9
Kotteakos v. *United States*, 328 U.S. 750 (1946)	5
O'Neal v. *McAninch*, 115 S. Ct. 992 (1995)	6, 7
Powell v. *United States*, cert. granted, No. 94-8842 (Oct. 4, 1995)	9
United States v. *Aggarwal*, 17 F.3d 737 (5th Cir. 1994)	9
United States v. *Atkins*, 25 F.3d 1401 (8th Cir.), cert. denied, 115 S. Ct. 371 (1994)	9
United States v. *Bayer*, 331 U.S. 532 (1947)	8
United States v. *Braslawsky*, 913 F.2d 466 (7th Cir. 1990)	9
United States v. *Colon*, 994 F.2d 1550 (2d Cir.), cert. denied, 493 U.S. 998 (1989)	9
United States v. *Johnson*, 28 F.3d 151 (D.C. Cir. 1994)	9
United States v. *Jones*, 24 F.3d 1177 (9th Cir. 1994)	9

Cases—Continued: Page

United States v. *Keller*, 916 F.2d 628 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991) 9
United States v. *Kimberlin*, 18 F.3d 1156 (4th Cir.), cert. denied, 114 S. Ct. 1857 (1994) 9
United States v. *Lane*, 474 U.S. 438 (1986) 5
United States v. *LeBlanc*, 24 F.3d 340 (1st Cir.), cert. denied, 115 S. Ct. 250 (1994) 9
United States v. *Price*, 13 F.3d 711 (3d Cir.), cert. denied, 114 S. Ct. 1863 (1994) 9
United States v. *Rodriguez*, 30 F.3d 1318 (10th Cir. 1994) 9
United States v. *Schatzle*, 901 F.2d 252 (2d Cir. 1990) 8
United States v. *Vincent*, 20 F.3d 229 (6th Cir. 1994) 9

Statute and rules:

18 U.S.C. 242 1
Fed. R. Crim. P.:
Rule 6 5
Rule 8(b) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is unpublished, but the judgment is noted at 35 F.3d 171 (Table). The district court's order denying petitioner's motions for a new trial and acquittal (Pet. App. 21a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1995. A petition for rehearing was denied on July 25, 1995. Pet. App. 44a-45a. The petition for a writ of certiorari was filed on October 23, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of willfully using unreasonable force in the arrest of Larry Overbey, in violation of 18 U.S.C. 242 (Count 1); and willfully filing false criminal charges against Overbey, in violation of 18 U.S.C. 242 (Count 2). Petitioner was sentenced to concurrent prison terms of 63 months on Count 1 and twelve months on Count 2. Pet. App. 39a. The court of appeals affirmed the conviction and sentence imposed under Count 1, and reversed and remanded the conviction and sentence under Count 2. *Id.* at 20a.

1. On August 12, 1989, Larry Overbey was driving his pick-up truck on an interstate highway in excess of the speed limit. Officer Andrews of the Covington, Kentucky, Police Department attempted to stop Overbey. Overbey refused to comply and led police on a high-speed chase before he finally pulled over. The chase involved several officers from the Covington Police Department, including petitioner. Andrews was the first officer on the scene. He approached the driver's side of the truck, grabbed Overbey by the arm, removed him from the truck, and ordered him to the ground. When Overbey complied, Andrews grabbed his hands and handcuffed his left wrist. Pet. App. 2a; Gov't C.A. Br. 4-5.

While Overbey was lying face down on the ground, petitioner struck him on the right side of the head several times with his metal flashlight. As Overbey reacted and began to get to his knees, Andrews struck him twice with the butt of his gun and once with his black jack. At least two other officers struck Overbey several times with their flashlights.

Andrews also sprayed mace in Overbey's face. When the paramedics arrived, Overbey was lying on the ground in a large pool of blood. Overbey was transported to a hospital, where he received more than 50 stitches to his head. Pet. App. 3a; Gov't C.A. Br. 5-6.

The same day, petitioner filed a complaint in Hamilton County Municipal Court charging Overbey with resisting arrest and assault. Overbey entered a no contest plea to a misdemeanor charge of attempted assault. Overbey testified at trial that he did not offer any resistance to the arrest and that he entered the plea out of fear that he would otherwise go to jail. Pet. App. 3a-4a.

2. The court of appeals affirmed the conviction and sentence under Count 1 and reversed and remanded the conviction and sentence under Count 2. Pet. App. 1a-20a. The court held that the district court had misconstrued Ohio law when it instructed the jury that "you may not draw the inference that Mr. Overbey * * * committed the acts charged by virtue of his plea of no contest in the state court." *Id.* at 11a-12a. The court determined that the erroneous instruction required reversal of petitioner's conviction for having filed false criminal charges against Overbey because the significance of Overbey's plea "goes to the heart of [petitioner's] defense" to that count. *Id.* at 15a. The court concluded that the erroneous instruction did not require reversal of petitioner's conviction for using unreasonable force, however, because "the admissions made by Overbey in the context of the no contest plea, if deemed conclusive by the jury, would not constitute a complete defense" to that count. *Id.* at 15a-16a n.6.

The court of appeals also rejected petitioner's contention that the district court's reasonable force

instruction was deficient because it did not include language tracking the statement in *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989), that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Pet. App. 9a-11a. The court held that "a judge does not commit error because he or she fails to use language contained in a request, so long as the instruction given is accurate and sufficient." *Id.* at 10a. Noting that "the district court took pains to require that the jury evaluate the incident in a context-sensitive manner," the court held that the instruction given by the court was accurate and sufficient. *Ibid.*

Finally, the court of appeals refused to review petitioner's claim that the district court abused its discretion in refusing to grant a downward departure from the applicable Guidelines range. Pet. App. 20a. The court explained that "this court does not review denial of a motion for downward departure as long as the sentence imposed was within the properly calculated guideline range." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 12-17) that the court of appeals misapplied harmless error principles when it concluded that the error in the jury instructions concerning the relevance of Overbey's plea of no contest was harmless as to Count 1. That fact-bound contention is without merit.

When reviewing claims of constitutional error on direct appeal, the relevant inquiry is whether the

error is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); see *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1717 (1993). In contrast, when reviewing claims of nonconstitutional error on direct appeal, the relevant inquiry is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). In this case, the court of appeals concluded that the district court misconstrued Ohio law when it instructed the jury that it could not infer that Overbey had committed attempted assault by virtue of his plea of no contest to that charge. Pet. App. 11a-16a. Because the weight that is given to a victim's plea of no contest under state law does not raise a constitutional issue, the *Kotteakos* standard is applicable here. See *Kotteakos*, 328 U.S. at 767-772, 774 (applying the standard announced in that case to an erroneous jury instruction concerning the scope of the conspiracy that the government sought to prove, a variance between the indictment and the proof, and misjoinder); see also *United States* v. *Lane*, 474 U.S. 438, 446, 449 (1986) (applying *Kotteakos* standard to misjoinder under Fed. R. Crim P. 8(b)); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256, 257-263 (1988) (applying *Kotteakos* standard to errors under Fed. R. Crim. P. 6).

Under the *Kotteakos* standard, the district court's instruction concerning Overbey's plea of no contest constituted harmless error. Petitioner had a full opportunity to develop evidence that Overbey assaulted him. Petitioner himself testified that Overbey pushed him to the ground. Pet. App. 2a. The local prosecutor testified concerning the circumstances surrounding Overbey's plea, including that Overbey

admitted having assaulted petitioner and that the trial judge found Overbey guilty of attempted assault. *Id.* at 107a. Petitioner's counsel repeatedly argued to the jury that Overbey's plea undermined the government's case. *Id.* at 109a-111a. And the district court instructed the jury that it could consider Overbey's plea in resolving the charges against petitioner. *Id.* at 11a. In those circumstances, the instruction challenged by petitioner could not have had a material effect on the jury's verdict.

That is particularly true because the question whether Overbey assaulted petitioner had only limited relevance on the count charging petitioner with willfully using unreasonable force. The government introduced overwhelming evidence, including eyewitness testimony from two officers, that petitioner struck Overbey several times in the head with his flashlight while Overbey lay face down on the ground. Pet. App. 106a. Even if Overbey had pushed petitioner to the ground beforehand, that would not have entitled petitioner to retaliate by repeatedly striking Overbey in the head with a flashlight while Overbey lay in a prone position. The court of appeals therefore correctly concluded that the district court's error in instructing the jury on the relevance of Overbey's plea of no contest was harmless.[1]

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[1] Petitioner contends (Pet. 13-14) that the court of appeals incorrectly shifted the burden of proof on the issue of harmless error from the government to him. That contention is without merit. The court of appeals' one sentence explanation of its harmless error conclusion does not address the burden of proof. Pet. App. 15a n.6. That is hardly surprising. As this Court explained in *O'Neal* v. *McAninch*, 115 S. Ct. 992, 994 (1995), "record review" ordinarily permits an appellate court to resolve the question whether an error affected the jury's ver-

2. Petitioner next contends (Pet. 17-20) that the jury instructions regarding reasonable force were erroneous because they did not include language tracking the statement in *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989), that "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." That contention is without merit.

In *Graham*, the Court held that an officer's use of force to effect an arrest must be evaluated from the perspective of a reasonable officer at the scene confronted with the same circumstances that the defendant faced. 490 U.S. at 396-397. The district court's instructions correctly stated the law under *Graham*. The court instructed the jury to judge petitioner's conduct "from the point of view of a reasonable officer on the scene of the charged event." Pet. App. 52a. The district court also detailed a series of factors that the jury should consider in making that determination. *Id.* at 52a-53a.[2] As the court of appeals

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dict without relying on the burden of proof. The fact that the government bears the burden of proving harmlessness is significant only in the "unusual" case in which the court is in equipoise as to the harmlessness of an error. *Ibid.* When, as in this case, a court concludes that an error was harmless without discussing the burden of proof, the most logical inference is that the court was not in equipoise on the issue and therefore had no need to consider which party bore the burden of proof.

[2] The instruction provided:

> [Y]ou may look to such factors as the severity of the crime of which Larry Overbey was suspected at the time of his arrest; whether, at the time of his arrest, Mr. Overbey

concluded, the district court "took pains to require that the jury evaluate the incident in a context-sensitive manner." *Id.* at 10a. Because the district court's instructions accurately stated the law under *Graham*, the district court was not required to include the specific language from *Graham* desired by petitioner. As this Court has held, "[o]nce the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *United States* v. *Bayer*, 331 U.S. 532, 536 (1947).

The courts of appeals that have addressed the question have uniformly agreed with the court's holding in this case that reasonable force instructions need not include the language from *Graham* sought by petitioner. See *United States* v. *Schatzle*, 901 F.2d 252, 254-255 (2d Cir. 1990) ("We cannot place the talismanic weight urged by [defendant] on *Graham*'s exact wording and do not believe the district court needed to echo the opinion paragraph by paragraph to convey adequately its import to the jury."); *Fikes* v.

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posed an immediate threat to the safety of the defendants or other police officers; whether, at the time of his arrest, Mr. Overbey was resisting arrest or attempting to evade arrest by flight; the need for the application of force; whether the victim was restrained; the victim's position in relation to where the defendants were located; the relationship between the need and the amount of force that was used; the extent of injury inflicted; the physical condition of the victim; and whether force was applied in good faith or for the very purpose of causing harm. You may also consider the character and duration of the alleged assault, and the manner in which the alleged assault occurred, and any other factors that you deem relevant.

Pet. App. 52a-53a.

Cleghorn, 47 F.3d 1011, 1013-1014 (9th Cir. 1995); *Jaffee* v. *Redmond*, 51 F.3d 1346, 1353-1354 (7th Cir.), cert. granted on other grounds, 116 S. Ct. 334 (1995). Review on that issue is therefore unwarranted.

3. Finally, petitioner contends (Pet. 20-21) that the district court abused its discretion in failing to depart from the applicable Guidelines range. As the court of appeals held, however, a district court's refusal to exercise its discretion to depart from the applicable Guidelines range is not appealable. Pet. App. 20a. That holding is consistent with the view of every other court of appeals.[3]

Contrary to petitioner's suggestion (Pet. 21), this case should not be held pending the outcome of *Koon* v. *United States* and *Powell* v. *United States*, cert. granted, Nos. 94-1664 & 94-8842 (Oct. 4, 1995). The petitions in those cases present the question "[w]hether a district court's downward departure from the prescribed range of the United States Sentencing Guidelines based upon factors not expressly

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[3] See, *e.g.*, *United States* v. *LeBlanc*, 24 F.3d 340, 348-349 (1st Cir.), cert. denied, 115 S. Ct. 250 (1994); *United States* v. *Colon*, 884 F.2d 1550, 1552-1556 (2d Cir.), cert. denied, 493 U.S. 998 (1989); *United States* v. *Price*, 13 F.3d 711, 736 (3d Cir.), cert. denied, 114 S. Ct. 1863 (1994); *United States* v. *Kimberlin*, 18 F.3d 1156, 1160 (4th Cir.), cert. denied, 114 S. Ct. 1857 (1994); *United States* v. *Aggarwal*, 17 F.3d 737, 745 (5th Cir. 1994); *United States* v. *Vincent*, 20 F.3d 229, 239 (6th Cir. 1994); *United States* v. *Braslawsky*, 913 F.2d 466, 467 (7th Cir. 1990); *United States* v. *Atkins*, 25 F.3d 1401, 1404-1405 (8th Cir.), cert. denied, 115 S. Ct. 371 (1994); *United States* v. *Jones*, 24 F.3d 1177, 1179 (9th Cir. 1994) (per curiam); *United States* v. *Rodriguez*, 30 F.3d 1318, 1319 (10th Cir. 1994); *United States* v. *Keller*, 916 F.2d 628, 637 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991); *United States* v. *Johnson*, 28 F.3d 151, 156 (D.C. Cir. 1994).

prohibited as grounds for departure is to be reviewed under the de novo standard * * * or under the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993), and other cases." 94-1664 Pet. i. The resolution of that issue has no bearing on whether a court of appeals has jurisdiction to review a district court's refusal to exercise its discretion to depart from the applicable Guidelines range.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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